

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
DEC 18 2000

CREDIT & DEBIT MANAGEMENT
Group OMD

OFFICE OF
MANAGING DIRECTOR

Sylvia Lesse, Esq.
Margaret Nyland, Esq.
Kraskin & Lesse, LLP
2120 L Street, NW
Suite 520
Washington, DC 20037

Re: Petition for Reconsideration
Accipiter Communications, Inc.
Fee Control No. 9609138140117001

Dear Ms. Lesse and Ms. Nyland:

This letter is in response to the Petition for Reconsideration of the denial of your request for waiver and refund of the \$5,665 filing fee submitted on behalf of Accipiter Communications, Inc. in connection with Accipiter's petition for waiver of the Commission's Part 36 data collection rules.

You stated in your request for refund of the filing fee that Accipiter recently received authorization to provide local telephone exchange service to portions of the State of Arizona. You further stated that Accipiter was a "small, newly-formed company" that planned to provide "initial service to a high-cost rural service area," and that "the imposition of a filing fee in this instance would increase the overall cost of service . . . and impose an unnecessary financial burden which Accipiter's subscribers would ultimately bear, contrary to the Commission's goals and policies." You sought a waiver of Sections 36.611 and 36.612 of the Commission's rules pertaining to data collection so that Accipiter may receive expedited Universal Service Fund support upon initiation of service on the basis of its current costs. In an initial letter ruling, we misinterpreted your request, however, and mischaracterized your petition as a request for waiver of the Commission's freeze on study area boundaries to enable Accipiter to initiate service to previously unserved areas, and thus mistakenly granted the refund based upon a recent decision by the Common Carrier Bureau that rendered such petitions unnecessary. See Request for Clarification (Definition of "Study Area"), 11 FCC Rcd 8156, 8160-61 (CCB 1996). In a subsequent letter ruling, we corrected our error and stated:

[G]iven that your waiver request actually is based solely on a compelling financial hardship, we believe that a more detailed showing is required. Specifically you should submit information such as a balance sheet, profit

and loss statement, [and] a cash flow projection (with and without the receipt of anticipated USF support).

We thereupon vacated our earlier ruling and denied the request for waiver and refund pending submission of a more persuasive, detailed showing of financial hardship.

In support of reconsideration, you assert that irrespective of the subject matter of the underlying petition, you demonstrated in your request that a refund would be in the public interest because imposition of a filing fee would result in an increase in the monthly rates of Accipiter's customers. You disagree that your request was "based solely on a compelling financial hardship" and assert that you should not be required to submit proprietary documentation such as a balance sheet, profit and loss statement, or cash flow projection. You further assert that the justification for refund of filing fees in connection with study area waiver requests is often similar to that underlying requests for waiver of universal service funding timing rules. You cite our Letter to U S West Communications, Inc. (September 20, 1996), where a refund was granted in conjunction with a request for waiver of frozen study area boundaries, and contend that, as in that instance, the need to avoid excessive and unnecessary additional costs is sufficient justification for a fee waiver and refund.

We deny the petition for reconsideration. Your argument on reconsideration is essentially repetitive of that previously presented and considered, namely, that the imposition of the \$5,665 filing fee in connection with your request for waiver of Sections 36.611 and 36.612 represents a significant expense for Accipiter and ultimately for Accipiter's residential customers. Hence, despite your assertion to the contrary, we continue to believe that your request for a refund must be supported by a satisfactory showing of financial hardship. In these circumstances it is appropriate to require submission of a detailed showing of such hardship sufficient to warrant a waiver, as explained in our previous letter ruling. See Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5346 (1994), recon. granted, 10 FCC Rcd 12759, 12761-62 (1995) (waiver will be granted "only when the impact of the regulatory fee will affect a regulatee's ability to serve the public").

To date, however, you have not complied with our directive to provide this information. Insofar as you object to the submission of such "proprietary documentation" to the Commission, we point out that, pursuant to Section 0.459 of the Commission's rules, you could have requested that any material you submitted not be made routinely available for public inspection, but you did not make such a request. See Letter to Stephen Liberty (August 25, 2000) (income tax return materials treated as confidential pursuant to Section 0.459). Furthermore, the asserted impact on residential customers' monthly rates is not, as noted above, a determinative factor in considering a fee waiver concerning Accipiter's petition for waiver of Sections 36.611 and 36.612. And the U S West letter ruling you rely on is inapposite. That ruling, in contrast to Accipiter's request for expedited

Ms. Lesse and Ms. Nyland


3.

Universal Service funding to allow it to speed service to unserved customers, involved a transfer of a telephone service territory serving only 19 access lines for the sum of one dollar. The holding of that ruling is limited to a finding that imposition of a filing fee in those circumstances would significantly increase the overall cost of an otherwise nominal cost transaction and impose a substantial financial burden on the regulatee. As set forth above, you have not made a showing as to how payment of this filing fee will affect your ability to serve the public.

Accordingly, your petition for reconsideration is denied. If you have any questions regarding this letter ruling, please contact the Revenue & Receivable Operation Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Reger", with a stylized flourish at the end.

 Mark A. Reger
Chief Financial Officer

Holly

9609138140117001

COF

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

JUN 20 1997

In the Matter of

Federal Communications Commission
Office of Secretary

Accipiter Communications, Inc.
Request for Refund of Filing Fee

)
)
) Fee Control #9609138140117001
)

To: Managing Director

PETITION FOR RECONSIDERATION

Accipiter Communications, Inc. ("ACI"), by its attorneys, and pursuant to Section 1.106 of the Commission's Rules,¹ respectfully submits this Petition for Reconsideration of the decision issued by the Office of the Managing Director ("OMD") by letter dated May 22, 1997. In its letter, the OMD vacated its earlier decision (issued April 18, 1997) granting ACI's request for refund ("Request") of the \$5,665 filing fee associated with ACI's Petition for Waiver ("Petition") of Sections 36.611 and 36.612 of the Commission's Rules ("Part 36 Rules").² ACI has demonstrated that good cause exists for waiver and refund of its \$5,665 filing fee, and that the public interest would be served thereby, as acknowledged by the OMD in its April 18, 1997 grant letter. Accordingly, ACI submits that reconsideration of the OMD's decision to vacate grant of the refund is warranted, and that such grant should be reinstated. In support thereof, ACI shows the following:

¹/ 47 C.F.R. § 1.106 (1996).

²/ On September 12, 1996, ACI submitted the required \$ 5,665 filing fee along with its Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules in order to expedite action on its waiver request.

I. ACI's Request Meets Established Standards.

The OMD has enunciated its criteria for evaluating requests for refund of filing fees.

The Commission may waive filing fees only upon a showing of good cause and a finding that the public interest will be served thereby.³

As demonstrated in its Request, ACI meets this standard; grant of its Request is therefore warranted. In vacating its earlier grant of ACI's Request, the OMD stated that it "misinterpreted" ACI's Request and mistakenly characterized ACI's Petition (for which \$5,665 filing fee is required) as a request for waiver of the Commission's freeze on study area boundaries.⁴ The OMD stated that it "inadvertently" granted the refund Request based on the recent decision by the Common Carrier Bureau that rendered such petitions unnecessary.⁵

OMD provides no justification for judging the merits of a refund request based upon the subject matter of the underlying petition. Moreover, the record is clear that the OMD granted its Request on the independent basis that imposition of the fee would disserve the public interest.

³/ See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947 (1987).

⁴/ OMD Letter of May 22, 1997.

⁵/ Id. citing Request for Clarification filed by the National Exchange Carrier Association, Inc. and Petitions for Waiver filed by Alaska Telephone Company, Ducor Telephone Company and Kingsgate Telephone, Inc., 11 FCC Rcd 8156 (1996). ACI is aware of the circumstances in which study area waivers are not required; ACI formerly sought a study area waiver jointly with US WEST in conjunction with ACI's acquisition of US WEST properties in Arizona. The petition underlying ACI's request for filing fee, however, sought expedited universal service funding to allow ACI to speed service to unserved customers in Arizona.

In granting ACI's Request, the OMD stated

We also note that ACI is a small telephone company that is providing limited access lines and that the imposition of the filing fee would represent a significant expense, which would dramatically increase residential customers' monthly rates. We believe that, under the circumstances presented, the public interest will be served by a waiver and refund of ACI's filing fee.⁶

Accordingly, regardless of the OMD's confusion regarding the nature of the petition underlying the Request, ACI has demonstrated, and OMD originally agreed, that the public interest would be disserved by imposition of the fee.

ACI respectfully disagrees with OMD's characterization of ACI's Request as being based "solely on a compelling financial hardship," and objects to its request that ACI submit information such as a balance sheet, profit and loss statement, or cash flow projection to justify grant of its Request.⁷ Under the existing guidelines for evaluation of requests for waiver and refund of filing fees, ACI should not be required to produce such proprietary documentation which is wholly unrelated to its demonstration that the public (in the form of ACI's ratepayers) will be disserved by imposition of the filing fee.⁸

In vacating its decision granting ACI's Request, the OMD provides cursory treatment of the facts and reasoning set forth by ACI in its Request. This lack of reasoned analysis on the part of the OMD is antithetical to proper administrative procedures. Under established guidelines, and as acknowledged by the OMD in its letter April 18, 1997, ACI has demonstrated that the public interest would be served by a waiver and refund of ACI's filing fee.

⁶/ OMD Letter of April 18, 1997.

⁷/ OMD Letter of May 22, 1997.

⁸/ See attached Declaration of Robert Richards, President of Accipiter Communications, Inc.

Accordingly, ACI respectfully requests that the OMD reinstate its decision granting ACI's Request.

II. ACI Should Be Afforded The Same Treatment As Other Petitioners Similarly-Situated.

The OMD has granted requests for refund of filing fees associated with petitions for waiver of frozen study area boundaries contained in Part 36 of the Commission's Rules. ACI submits that, according to the record of previous fee decisions, justification for refund of filing fees associated with Part 36 study area waiver requests is often similar to that underlying requests for waiver of Part 36 universal service funding timing rules. For example, in granting a request for refund of filing fee to US West Communications, Inc. ("US West") in conjunction with its request for waiver of frozen study area boundaries, the OMD stated

We are satisfied that the parties have demonstrated sufficient good cause to support the requested fee waiver. The petitions underlying the fee waiver involve only 19 access lines, resulting in a filing fee amounting to approximately \$280 per access line. Further, Rye will acquire the lines from US West for a nominal payment. Thus we conclude that imposition of the filing fee would significantly increase the overall cost of this otherwise nominal cost transaction, and impose a substantial financial burden on Rye, a small, independent rural telephone company.⁹

ACI's situation is similar to that cited, but even more compelling. ACI filed its Petition to expedite universal service funding to avoid burdening its rural customers for an interim period during which it would not, absent grant of its Petition, receive high-cost funding. In its Request, ACI demonstrated that the imposition of a \$5,665 filing fee would increase the overall cost of service provision and impose an unnecessary financial burden, which ACI's subscribers would ultimately bear, contrary to the goals and policies underlying the universal service rules.

⁹/ See Letter from OMD to US West Communications, Inc. dated September 20, 1996.


ACI respectfully submits that the justification for avoiding excessive and unnecessary additional costs, which the public would ultimately bear, is sufficient to warrant grant of a request for refund of filing fee, whether related to a request for waiver of Part 36 study area boundaries, or a request for waiver of Part 36 universal service timing rules, such as that filed by ACI. Accordingly, ACI respectfully requests that it be afforded treatment similar to that afforded other petitioners similarly-situated.

III. Conclusion

Inasmuch as ACI's Request for refund of filing fee meets the OMD's established standards, and ACI, under proper administrative procedures, should be treated the same as other petitioners similarly-situated, the OMD should reconsider its decision and reinstate expeditiously its grant of ACI's Request for waiver and refund of the Part 36 waiver filing fee.

Respectfully submitted,

ACCIPITER COMMUNICATIONS, INC.

By 
Sylvia Lesse
Margaret Nyland

Its Attorneys


Kraskin & Lesse, LLP
2120 L Street, NW
Suite 520
Washington, DC 20037
202/296-8890

June 20, 1997

ATTACHMENTS

DECLARATION OF ROBERT RICHARDS

I, Robert Richards, President of Accipiter Communications, Inc., hereby declare under penalties of perjury that ~~I have read the foregoing "Petition for Reconsideration" and the~~ information contained therein is true and accurate to the best of my knowledge, information, and belief.


Robert Richards, President
Accipiter Communications, Inc.

Date: June 18, 1997

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

April 18, 1997

OFFICE OF
MANAGING DIRECTOR

Ms. Sylvia Lesse, Esquire
Ms. Margaret Nyland, Esquire
Kraskin & Lesse
2120 L Street, N.W.
Suite 520
Washington, D.C. 20037

Re: Fee Control # 9609138140117001

Dear Ms. Lesse and Ms. Nyland:

This will respond to your request for refund of an application fee filed on behalf of Accipiter Communications, Inc. ("ACI") in connection with its petition for waiver of the Commission's freeze on study area boundaries, contained in the Part 36, Appendix-Glossary of the Commission's rules.

You represent that ACI recently received authorization to create a new study area and to provide local exchange telephone service to portions of Arizona State that had been previously unserved. See Petitions for Waiver filed by Accipiter Communications, Inc. and US West Communications, Inc., DA 96-1883 (CCB)(Nov. 14, 1996). You further characterize ACI as a "small, newly-formed company," that plans to provide "initial service to a high-cost rural service area," and that "the imposition of a filing fee in this instance would increase the overall cost of service . . . and impose an unnecessary financial burden which ACI's subscribers would ultimately bear, contrary to the Commission's goals and policies."

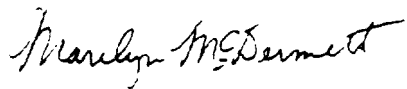
The Commission's procedures provide that, once an application has cleared the fee review process, irrespective of the disposition of the underlying application, the fee will be retained. See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 949 (1987), recon. denied, 3 FCC Rcd 5987 (1988). However, in this instance, we note that a recent Common Carrier Bureau decision, inter alia, clarified that local exchange carriers (LECs) do not have to file petitions for waiver of the study freeze rule "in order to create new study areas . . . when they begin serving previously unserved territories." See Request for Clarification filed by the National Exchange Carrier Association, Inc. and Petitions for Waiver filed by Alaska Telephone Company, Ducor Telephone Company and Kingsgate Telephone, Inc., 11 FCC Rcd 8156, 8160-61 (CCB 1996). Therefore, it does not appear that ACI was required to file its petition to create a new study area to serve previously unserved areas. We also note that ACI is a small telephone company that is providing limited access lines and that the imposition of the filing fee would represent a significant expense, which would dramatically increase residential customers' monthly rates. We believe that, under the circumstances presented, the public interest will be served by a waiver and refund of ACI's filing fee.

Ms. Sylvia Lesse
Ms. Margaret Nyland

Page 2

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of \$5,665, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section, at (202) 418-1995.

Sincerely,

A handwritten signature in cursive script, reading "Marilyn J. McDermett".

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

May 22, 1997

OFFICE OF
MANAGING DIRECTOR

Ms. Sylvia Lesse, Esquire
Ms. Margaret Nyland, Esquire
Kraskin & Lesse
2120 L Street, N.W.
Suite 250
Washington, D.C. 20037

Re: Fee Control # 9609138140117001

Dear Ms. Lesse and Ms. Nyland:

This letter shall serve to vacate the letter decision issued by this Office, on April 18, 1997, which granted your request for refund of the application fee filed on behalf of Accipiter Communications, Inc. ("ACI").

You had represented that ACI recently received authorization to provide local exchange telephone service to portions of Arizona State that had been previously unserved. See Petitions for Waiver filed by Accipiter Communications, Inc. and US West Communications, Inc., DA 96-1883 (CCB)(Nov. 14, 1996). You had further characterized ACI as a "small, newly-formed company," that plans to provide "initial service to a high-cost rural service area," and that "the imposition of a filing fee in this instance would increase the overall cost of service . . . and impose an unnecessary financial burden which ACI's subscribers would ultimately bear, contrary to the Commission's goals and policies."

You had sought waiver of Part 36 of the Commission's rules so that ACI may receive Universal Service Fund ("USF") support upon initiation of service, based upon current, as opposed to historical, costs. However, the Office of Managing Director's letter decision misinterpreted your request, and characterized your petition as a request for waiver of the Commission's freeze on study area boundaries to enable ACI to initiate service to previously unserved areas, and thus inadvertently granted the refund request based on the recent decision by the Common Carrier Bureau that rendered such petitions unnecessary. See Request for Clarification filed by the National Exchange Carrier Association, Inc. and Petitions for Waiver filed by Alaska Telephone Company, Ducor Telephone Company and Kingsgate Telephone, Inc., 11 FCC Rcd 8156, 8160-61 (CCB 1996); see also 47 C.F.R. § 1.1113(a)(1).

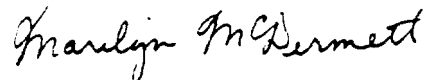
Generally, the Commission may waive filing fees only upon a showing of good cause and a finding that the public interest will be served thereby. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 961 (1987); see also 47 C.F.R. § 1.1117. You have represented that the imposition of the \$5,665.00 filing fee for waiver of Part 36 will represent a significant expense for ACI and ultimately ACI's residential customers. Nevertheless, given that your

Ms. Lesse and Ms. Nyland
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waiver request actually is based solely on a compelling financial hardship, we believe that a more detailed showing is required. Specifically, you Ms. Lesse should submit information such as a balance sheet, profit and loss statement, a cash flow projection (with and without the receipt of anticipated USF support). At this juncture, you have not made a showing sufficient to warrant waiver of the fee payment.

Therefore, based on the present state of the record, we are vacating the recent letter decision issued April 18, 1997, and we are denying your request for waiver without prejudice. ACI's refund request will be reinstated upon a more persuasive, detailed showing of financial hardship. If you have questions concerning this matter, please contact the Chief, Fee Section, at (202) 418-1995.

Sincerely,

A handwritten signature in cursive script that reads "Marilyn J. McDermott".

Marilyn J. McDermott
Associate Managing Director
for Operations

F
Rye

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

September 20, 1996

OFFICE OF
MANAGING DIRECTOR

Gregory L. Cannon, Esquire
U S West Communications, Inc.
1020 19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Cannon:

This is in response to your request filed on behalf of Rye Telephone Company (Rye) and U S West Communications, Inc. (U S West) for waiver of the \$5,350.00 filing fee required with their joint petition for waivers of the definition of a study area contained in Part 36 of the Commission rules and the Commission's Detailed Filing Guidelines for Part 36 Study Area.

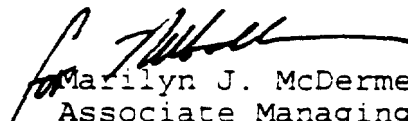
You state that U S West has agreed to transfer a small telephone service territory, serving 19 access lines, within its Walsenburg, Colorado exchange to Rye. The lines are to be transferred from U S West to Rye for one dollar. You contend that a waiver of the filing fee in this instance is in the public interest because the fee amount is significantly disproportionate to the number of access lines involved and the transaction price.

We are satisfied that the parties have demonstrated sufficient good cause to support the requested fee waiver. The petitions underlying the fee waiver involve only 19 access lines, resulting in a filing fee amounting to approximately \$280 per access line. Further, Rye will acquire the lines from U S West for a nominal payment. Thus, we conclude that imposition of the filing fee would significantly increase the overall cost of this otherwise nominal cost transaction and impose a substantial financial burden on Rye, a small, independent rural telephone company.

Accordingly, your request is granted.

A check, drawn in the amount of \$5,350.00 and made payable to the maker of the original check, will be sent to you at the earliest practicable time. If you have any questions about this refund, please contact the Chief, Fee Section, at (202) 418-1995.

Sincerely,


Marilyn J. McDermott
Associate Managing Director
for Operations

cc: Stephen G. Kraskin

CERTIFICATE OF SERVICE

I, Shelley Bryce, of Kraskin & Lesse, LLP, 2120 L Street, NW, Suite 520, Washington, DC, 20037, hereby certify that on the 20th day of June, 1997, a copy of the attached "Petition for Reconsideration" was hand-delivered to the parties listed below:


Shelley Bryce

Andrew S. Fishel
Managing Director
Federal Communications Commission
1919 M Street, NW
Room 852
Washington, DC 20554

Marilyn J. McDermott
Associate Managing Director for Operations
Federal Communications Commission
1919 M Street, NW
Room 852
Washington, DC 20554

Payment Transactions Detail Report

Date: 7/25/97

BY: FEL CONTROL NUMBER

Fee Control Number	Payor Name	Account Number	Received Date
9609138140117001	ACCIPITER COMMUNICATIONS INC PO BOX 11929	6028613590	09/12/96

GLENDAL AZ 85318

Payment Amount	Current Balance	Seq Num	Payment Type Code	Quantity	Callsign Other Id	Applicant Name	Applicant Zip	Bad Check	Detail Amount	Trans Code	Payment Type
\$5,665.00	\$5,665.00	1	BEA	1		ACCIPITER COMMUNICATIONS INC			\$5,665.00	1	PMT
Total									\$5,665.00		